Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-01-26 OF 1996
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
14 JANUARY 1997

Armed Forces *— Court martial — Appeal against decision of court martial — Whether court martial was wrong to call upon accused to enter his defence — Accused applied for certiorari to quash decision of court martial — Whether High Court wrong to dismiss certiorari application — Whether accused should have appealed against decision of court martial under r 101 of the Armed Forces (Court Martial) Rules of Procedure 1976 — Armed Forces (Court Martial) Rules of Procedure 1976 rr 74 & 101(2)*

Armed Forces *— Court martial — Procedure — Standard of proof at the end of prosecution's case — What is the standard of proof to establish a prima facie case — Armed Forces (Court Martial) Rules of Procedure 1976 r 74(1)*

Criminal Procedure *— Trial — Close of prosecution's case — Court martial — Whether court martial applied wrong standard of proof — Meaning of 'prima facie case' — Whether prosecution had established a prima facie case — Meaning of 'proved' and how to determine whether a fact is 'proved' — Whether court martial was wrong to call upon accused to enter his defence — Whether necessary for court martial to supply reasons for calling for the defence — Evidence Act 1950 ss 3 & 4 — Armed Forces (Court Martial) Rules of Procedure 1976 r 74(1)*

Words and Phrases *— 'Prima facie case' — Armed Forces (Court Martial) Rules of Procedure 1976 r 74(1)*

The accused, an officer in the armed forces, was charged with various corrupt offences. At the court martial, the prosecution called witnesses who gave testimony in support of the charges, and who were subsequently cross-examined by the defence. At the close of the prosecution's case, the defence made a lengthy submission of no case to answer pursuant to r 74 of the Armed Forces (Court Martial) Rules of Procedure 1976 ('the Rules'), a substantial portion of which dealt with the standard of proof on the prosecution, relying on *Haw Tua Tau v PP* [1981] 2 MLJ 49. The prosecution answered the defence's arguments. The court martial then retired to consider the matter with the judge advocate. When it reconvened, the president announced that the prosecution had successfully proven a prima facie case against the accused, and required the accused to make his defence on the charges. The defence thus gave evidence, calling 10 witnesses. Both parties made lengthy closing submissions. The court martial then retired to consider its verdict, and the accused was found guilty on some of the charges. The court martial, as required by r 89 of the Rules', pronounced that the accused was dismissed with disgrace from the service.

A The Rules stipulated that an appeal against the court martial's decision was to be made under r 101(2) within six months of the decision. The accused did not appeal under the Rules, but instead applied to the Penang High Court for certiorari. The application was consequently dismissed. The accused appealed against the dismissal of the certiorari application as well as against the decision of the B court martial, arguing that: (i) the court martial, by failing to give reasons why it had called the defence, had applied the wrong standard of proof at the end of the prosecution's case, as the lower standard in *Haw Tua Tau* had been applied and not the higher standard of *Khoo Hi Chiang*; (ii) the law relating to 'prima facie' case was in conflict C and thus this case should be held in abeyance until the Federal Court decided the issue; and (iii) the certiorari application had been properly made and that r 101(2) of the Rules did not limit the accused's right to certiorari.

D **Held**, dismissing the appeal:

(1) It was not right to adjourn the case indefinitely simply because some other court would, at a future date, decide what 'prima facie' case should mean in the context of the proposed amendments to the Criminal Procedure Code (FMS Cap 6) (see p 569H).

E (2) Under r 74 of the Rules, at the end of the prosecution's case, if the prosecution has failed to establish a prima facie case, the accused may submit to the court that he should not be called upon to make his defence. A prima facie case must be proved as per s 3 of the Evidence Act 1950 and is one that has proceeded F to a stage where it is regarded as proved because the evidence led supports such a finding if no evidence to the contrary is adduced (see pp 570C and 575F–G).

(3) The degree of proof required to establish a prima facie case is proof beyond all reasonable doubt. After the defence is called, if the accused elects to remain silent and calls no evidence, the G prosecution's case remains unrebutted and the court has to convict on the very same material (see p 578A–B); *Haw Tua Tau v PP* [1981] 2 MLJ 49 distinguished; *Khoo Hi Chiang v PP* [1994] 1 MLJ 269 and *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 followed.

H (4) It is not known whether the court martial applied the *Haw Tua Tau* or the *Khoo Hi Chiang* test. However, even if the court did apply *Haw Tua Tau* that decision was good law at that time and was binding on all inferior courts in the country. The record showed that the court martial found that the prosecution had I proved a prima facie case on all the factual ingredients of both charges. In any case, even if the court martial applied the *Khoo Hi Chiang* test, it would still have called for the defence (see pp 578G–H and 579F–G).

(5) Rule 101 of the Rules provides the accused with a right of appeal. The accused, however, elected to come to court for certiorari rather than appeal. Civil courts should be very careful to ensure that in the guise of an application for certiorari, the courts are not converted into appellate courts. It is only in exceptional circumstances that a civil court should interfere. So far as the present case was concerned, the complaint of the accused was properly the subject matter of an appeal under r 101. The court martial had meticulously followed the Rules and there was nothing whatsoever wrong with the decision-making process. The failure of the accused to resort to r 101 was sufficient ground for the accused's application for prerogative relief to be refused (see pp 579D–F and 580D–E); *Mejar Ali Zaman bin Ali Hassan v Captain Abdul Kadir & Anor* [1989] 3 MLJ 32 followed.

(6) There is no legal requirement for a court to give reasons for its decision to call for the defence and such a decision is a procedural ruling which is not by itself appealable. The need to give reasons only arises if there is an appeal against an acquittal at the close of the prosecution's case, or in the event of an appeal against a conviction at the end of the trial because the court will be obliged to explain why the accused has failed to rebut the prosecution's case (see pp 579I and 580A–B); *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 and *PP v RK Menon & Anor* [1978] 2 MLJ 152 followed.

[Bahasa Malaysia summary

Tertuduh, seorang pegawai dengan pasukan bersenjata, telah dipertuduh dengan pelbagai kesalahan rasuah. Di mahkamah tentera, pihak pendakwa telah memanggil saksi yang memberi testimoni yang menyokong pertuduhan, dan mereka kemudiannya diperiksa balas oleh pihak pembelaan. Di penghujung kes pendakwa, pembela telah membuat hujah yang panjang tiada kes untuk dijawab menurut k 74 Kaedah-Kaedah Prosedur Angkatan Bersenjata (Mahkamah Tentera) 1976 ('Kaedah tersebut'), sebahagian besar yang mana berkaitan dengan beban membukti atas pihak pendakwa, dengan bergantung pada *Haw Tua Tau v PP* [1981] 2 MLJ 49. Pihak pendakwa menjawab hujah pihak pembela. Mahkamah tentera kemudian berehat untuk mempertimbangkan perkara itu dengan hakim peguam. Apabila ia bersidang semula, presiden mengumumkan bahawa pihak pendakwa telah berjaya membuktikan suatu kes prima facie terhadap tertuduh, dan menghendaki tertuduh membuat pembelaan atas pertuduhan. Justeru itu, pihak pembelaan memberi keterangan, dengan memanggil 10 saksi. Kedua-dua pihak membuat hujah penutup yang panjang. Mahkamah tentera kemudian berehat untuk mempertimbangkan keputusannya, dan tertuduh didapati bersalah atas beberapa pertuduhan. Mahkamah tentera, seperti yang dikehendaki oleh k 89 Kaedah tersebut, mengisytiharkan bahawa tertuduh dipecat dari perkhidmatan.

Kaedah tersebut mensyaratkan bahawa sesuatu rayuan terhadap keputusan mahkamah tentera haruslah dibuat di bawah k 101(2) dalam tempoh enam bulan daripada keputusan. Tertuduh tidak merayu di bawah Kaedah tersebut, tetapi sebaliknya memohon kepada Mahkamah Pulau Pinang untuk certiorari. Permohonan itu ditolak. Tertuduh merayu terhadap penolakan permohonan certiorari dan juga terhadap keputusan mahkamah tentera, dengan berhujah bahawa: (i) mahkamah tentera, dalam kegagalan memberi sebab mengapa ia telah memanggil pembelaan, telah memakai beban membukti yang salah di penghujung kes pendakwa, oleh kerana beban yang lebih rendah *Haw Tua Tau* telah dipakai dan bukan beban *Khoo Hi Chiang* yang lebih tinggi; (ii) undang-undang berhubung dengan kes 'prima facie' adalah bertentangan dan maka kes ini patut dibiarkan sehingga Mahkamah Persekutuan memutuskan isu; dan (iii) permohonan certiorari telah dibuat dengan betul dan bahawa k 101(2) Kaedah tersebut tidak menghadkan hak tertuduh kepada certiorari.

Diputuskan, menolak rayuan:

(1) Adalah tidak betul untuk menangguh kes bagi tempoh masa yang tidak pasti hanya kerana mahkamah lain akan memutuskan apakah makna kes 'prima facie' dalam konteks pindaan yang dicadangkan kepada Kanun Acara Jenayah (NMB Bab 6) pada suatu tarikh masa depan (lihat ms 569H).

(2) Di bawah k 74 Kaedah tersebut, di penghujung kes pendakwa, jika pihak pendakwa telah gagal mewujudkan suatu kes prima facie, tertuduh boleh berhujah kepada mahkamah bahawa dia tidak patut dipanggil untuk membuat pembelaan. Suatu kes prima facie mesti dibuktikan mengikut s 3 Akta Keterangan 1950 dan merupakan suatu kes yang telah terus ke takat di mana ia dianggap telah dibuktikan sebab keterangan telah membawa kepada pendapat demikian jika tiada keterangan bertentangan dikemukakan (lihat ms 570C dan 575F–G).

(3) Darjah bukti yang dikehendaki bagi mewujudkan suatu kes prima facie adalah bukti melampaui semua keraguan munasabah. Selepas pihak pembelaan dipanggil, jika tertuduh memilih untuk mendiam diri dan tidak memanggil keterangan, kes pihak pendakwa kekal tidak dipatahkan dan mahkamah harus menyabit atas material yang sama (lihat ms 578A–B); *Haw Tua Tau v PP* [1981] 2 MLJ 49 dibeza; *Khoo Hi Chiang v PP* [1994] 1 MLJ 269 dan *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 diikut.

(4) Ia tidak diketahui sama ada mahkamah tentera telah memakai ujian *Haw Tua Tau* atau *Khoo Hi Chiang*. Namun demikian, jika pun mahkamah telah memakai *Haw Tua Tau* keputusan itu merupakan undang-undang yang baik pada masa itu dan adalah mengikat atas semua mahkamah bawah negara. Rekod menunjukkan bahawa mahkamah tentera mendapati pihak pendakwa telah membuktikan suatu kes prima facie atas semua unsur faktual kedua-dua pertuduhan. Walau bagaimanapun, jika

pun mahkamah tentera telah memakai ujian *Khoo Hi Chiang*, ia masih tetap memanggil pihak pembelaan (lihat ms 578G–H dan 579F–G). A

(5) Kaedah 101 Kaedah tersebut memperuntukkan tertuduh dengan hak merayu. Namun demikian, tertuduh memilih untuk memohon certiorari daripada mahkamah berbanding dengan membuat rayuan. Mahkamah sivil haruslah berjaga-jaga dalam memastikan bahawa dalam permohonan yang bertopengkan permohonan untuk certiorari mahkamah tidak dijadikan mahkamah rayuan. Mahkamah sivil haruslah campur tangan dalam keadaan luar biasa sahaja. Sejauh mana kes ini berkaitan, aduan tertuduh dengan betulnya merupakan perkara suatu rayuan di bawah k 101. Mahkamah tentera telah mengikut Kaedah tersebut secara teliti dan tiada apa yang salah dengan proses membuat keputusan. Kegagalan tertuduh untuk menggunakan k 101 adalah alasan yang mencukupi bagi menolak permohonan tertuduh untuk relief prerogatif (lihat ms 579D–F dan 580D–E); *Mejar Ali Zaman bin Ali Hassan v Captain Abdul Kadir & Anor* [1989] 3 MLJ 32 diikut. B C D

(6) Tiada keperluan undang-undang untuk sebuah mahkamah memberikan sebab untuk keputusan memanggil pembelaan dan keputusan sedemikian adalah keputusan prosedur yang tidak boleh dirayu. Keperluan untuk memberi sebab hanya timbul jika terdapatnya rayuan terhadap pembebasan di penghujung kes pihak pendakwa, atau sekiranya terdapat rayuan terhadap sabitan di penghujung perbicaraan sebab mahkamah wajib menjelaskan mengapa tertuduh telah gagal mematahkan kes pihak pendakwa (lihat ms 579I dan 580A–B); *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 and *PP v RK Menon & Anor* [1978] 2 MLJ 152 diikut.] E F

Notes

For cases on the standard of proof at the end of the prosecution's case generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2905–2915; [1994] *Mallal's Digest* paras 1165–1167; [1995] *Mallal's Digest* paras 840–843. G

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Haw Tua Tau v PP [1981] 2 MLJ 49 (distd) H
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (folld)
Karam Singh v PP [1967] 2 MLJ 25 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Mejar Ali Zaman bin Ali Hassan v Captain Abdul Kadir & Anor [1989] 3 MLJ 32 (folld) I
Miller v Minister of Pensions [1947] 2 All ER 372 (refd)
Nunis v PP [1982] 2 MLJ 114 (refd)
Ong Kiang Kek v PP [1970] 2 MLJ 283 (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166; [1980] 1 MLJ 117 (refd)

PP v Ong Khoon Seng [1982] 1 MLJ 351 (refd)
PP v RK Menon & Anor [1978] 2 MLJ 152 (refd)
R v Galbraith (1981) 73 Cr App R 124 (refd)
Saminathan & Ors v PP [1955] MLJ 121 (refd)

Legislation referred to

Armed Forces Act 1972 ss 85, 87, 88
Armed Forces (Court Martial) Rules of Procedure 1976 rr 74, 75, 76, 78, 80, 89, 99, 101(1), (2)
Criminal Procedure Code (FMS Cap 6) ss 173(f), (h), 174(2), 182
Criminal Procedure Code (Amendment) Act 1995
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)
Evidence Act 1950 ss 3, 4

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Zulkifli bin Bakar and *Lam Mei Peng* (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Mahadev Shankar JCA: We dismissed this appeal against the order of the High Court at Penang refusing the appellant's application for certiorari to quash the decision of the court martial held in Penang on 25 May 1990 whereby the appellant was dismissed with disgrace from His Majesty's service.

The appellant ('the accused') had claimed trial to the following charges to which full particulars were annexed before he pleaded to them. Briefly, the charges were:

— firstly, that on 11 September 1987 he had committed a civil offence and thereby committed an offence against s 88 of the Armed Forces Act 1972 ('the Act') in that he had committed a corrupt practice against s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970. Alternatively, that at the same time and place he had behaved in a scandalous manner unbecoming of the character of an officer and a gentleman in contravention of s 85 of the Act;

— secondly, that on 15 February 1988 he had committed an act to the prejudice of good order and service discipline contrary to s 87 of the Act; and

— thirdly, that he had committed a similar offence on 26 September 1987.

Seven witnesses gave evidence in support of the prosecution's case and were cross-examined by defence counsel.

At the close of the prosecution's case on 6 January 1990, the accused's counsel made a lengthy submission of no case to answer, a substantial portion of which dealt with the burden of proof on the prosecution. The prosecuting officer ('the PO') then made a full response. As to the law, the accused's counsel cited *Haw Tua Tau v PP* [1981] 2 MLJ 49 on the burden of proof and *PP v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166

and [1980] 1 MLJ 117 on whether the appellant was a public servant, and whether what was done was to his advantage. The PO cited *Miller v Minister of Pensions* [1947] 2 All ER 372 and commented on *Haw Tua Tau* at some length. On the question of whether the accused was a public servant and whether what he had done was to his advantage, the PO also referred to *Nunis v PP* [1982] 2 MLJ 114. The rest of the submissions on both sides was an in-depth analysis of the evidence and the proper inferences to be drawn from them.

The court martial then retired to consider the matter with the judge advocate. When it reconvened, the president announced that the prosecution had successfully proved that there was a prima facie case in the following words:

> YDP mengumumkan bahawa mahkamah mendapati pihak pendakwa berjaya *membuktikan* adanya kes prima facie terhadap tuduhan-tuduhan berikut. (Emphasis added.)

The charges in question were the first charge, the alternative charge and the second charge. The charges were read out in full to the accused and the president announced:

> Oleh itu tertuduh dikehendaki membuat pembelaan di atas pertuduhan-pertuduhan tersebut. Mahkamah mendapat pertuduhan ketiga tiada kes untuk dijawab.
>
> ('Therefore the accused is required to make his defence on the charges aforesaid. The court finds that no defence is required to the third charge').

The accused gave evidence and called ten witnesses. Very lengthy closing submissions were made first by the PO in accordance with r 78 of the Armed Forces (Court Martial) Rules of Procedure 1976 ('the Rules') followed by the defence counsel, after which the judge advocate summed up. The court then retired to consider its verdict; and having done so, reconvened on 25 May 1990 to announce that it had found the accused not guilty of the first charge but guilty of the alternative charge and of the second charge. The accused's counsel declared he had nothing he wished to say in mitigation. The court then — and as required by r 89 — pronounced one sentence in respect of both offences, viz that the accused be dismissed with disgrace from His Majesty's service.

As required by r 99, this sentence was confirmed by the confirming officer on 31 July 1990 and promulgated to the accused by his commanding officer on 27 August 1990. The next step was to proceed under r 101(2). It reads:

> (2) If an accused who has been sentenced by a court-martial wishes to petition after promulgation against the sentence, he shall present a petition to a reviewing authority or an officer authorised to reconsider a sentence of a court-martial under section 128 of the Act at any time within six months of promulgation in the appropriate form set out in Twelfth Schedule to these Rules.

A This the accused did not do. Instead, he filed a motion in the Penang High Court for certiorari. The learned High Court judge dismissed the substantive application on 21 July 1994.

The memorandum of appeal lists six grounds why the learned judge erred in not granting the application. Before us, En Karpal Singh confined B his appeal to one ground only, viz:

> 2 The learned judge was wrong in not concluding that at the close of the prosecution's case the Mahkamah Tentera, Pulau Pinang was wrong to have called upon the appellant's defence on the first and alternative charge and the second charge having regard to the principles relating to proof beyond reasonable doubt at the close of the prosecution's case in C *Khoo Hi Chiang v PP* [1994] 1 MLJ 265.

On 6 January 1990 when the court martial called upon the accused to enter his defence, *Haw Tua Tau* was generally thought to have established the required test. *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 only came into existence on 24 December 1993. The application was heard in mid-1994. D

Before the learned judge in the court below, the accused's counsel contended in 1994 that the court had misdirected itself on the burden of proof. The learned High Court judge said even if the *Khoo Hi Chiang* approach had been used, the answer of the court martial would still have been the same. He also said that the accused should have followed E r 101(2) and that this was not a proper case for relief by way of certiorari. The accused then appealed to us.

On 27 July 1996, the Federal Court had decided by a majority of 4:3 that *Khoo Hi Chiang* was correctly decided. The case (reported in [1997] 1 MLJ 1) is *Arulpragasan a/l Sandaraju v PP*. Encik Karpal Singh said that F Parliament was in the process of restoring the effect of *Haw Tua Tau* by amending the Criminal Procedure Code (FMS Cap 6) ('the Code') and handed us copies of the Bill which he said was about to be gazetted.

He said that the issue of what constitutes a 'prima facie' case will therefore come up again for decision in one of the many appeals pending after *Khoo Hi Chiang* — but not yet heard in the Federal Court — and we G should therefore adjourn the present appeal until such a decision became available to guide us as to what the court martial should have done at the close of the prosecution.

We did not think it right to adjourn this matter indefinitely simply because some other court would, at some future date, decide what a H 'prima facie' case should mean in the context of the proposed amendments to the Code. The subject matter of this appeal was whether the High Court, in the exercise of its supervisory jurisdiction, had been right in refusing certiorari. If the accused felt aggrieved by our decision, he could appeal to the Federal Court. We therefore rejected the application.

I Encik Karpal Singh then submitted that since the court martial had not supplied any reasons as to why it had called for the defence, we should

infer that it had not applied the maximum evaluation test required by *Khoo Hi Chiang* but the minimum evaluation test required by *Haw Tua Tau* and that accordingly there was a misdirection which vitiated the trial.

We saw no merit whatsoever in this line of argument and dismissed the appeal without calling upon the learned deputy public prosecutor. Our reasons now follow.

Khoo Hi Chiang and *Arulpragasan* are both decisions based on the Code. The Rules are very differently worded from the Code. The material rule here is r 74. It reads as follows:

> Submission of no case to answer
>
> 74 (1) At the close of the case for the prosecution the accused may submit to the court in respect of any charge that the prosecution has failed to establish a *prima facie* case for him to answer and that he should not be called upon to make his defence to that charge.
>
> (2) If the accused makes a submission under paragraph (1), the prosecutor may address the court in answer thereto and the accused may reply to the prosecutor's address.
>
> (3) The court shall then close to deliberate on whether a *prima facie* case has been made out against the accused.
>
> (4) The court shall re-open when it has arrived at a decision and —
>
> (a) if it has been decided that no *prima facie* case has been made out in respect of a charge, the president shall find the accused not guilty on that charge; or
>
> (b) if it has been decided that a *prima facie* case has been made out in respect of a charge, the president shall direct that the trial proceed on that charge.
>
> (5) The court shall not allow the submission unless it is satisfied that —
>
> (a) the prosecution has not established a *prima facie* case on the charge as laid; and
>
> (b) it is not open to them on the evidence adduced to make a finding under section 114 of the Act or paragraph (3) of Rule 81.
>
> (6) If the court allows the submission it shall find the accused not guilty of the charge to which it relates and announce this finding in open court forthwith; if the court disallows the submission it shall proceed with the trial of the offence as charged.
>
> (7) Irrespective of whether there has been a submission under this Rule or not, the court may at any time after the close of the hearing of the case for the prosecution, and after hearing the prosecutor, find the accused not guilty of a charge, and if it does so it shall also announce such finding in open court forthwith.

Section 114 and r 81(3) do not concern us here because they relate to the power to convict for an offence other than that charged.

The question that now arises is whether — notwithstanding r 74(1) which only requires the prosecution to establish a prima facie case — the

A entire proceedings was a nullity because the tribunal applied the minimum evaluation test at the close of the prosecution case.

It is regrettable that despite the monumental efforts made by Edgar Joseph Jr SCJ (now FCJ) in *Khoo Hi Chiang*, the view still seems to prevail that *Haw Tua Tau* created two standards of proof: a lighter one at the close B of the prosecution, and a maximum evaluation test only at the end of the trial. We feel obliged to spell out as clearly as we can why such a view is fallacious.

Only one local decision on the point (ie *Ong Kiang Kek v PP* [1970] 2 MLJ 283) was cited to the Privy Council in *Haw Tua Tau* when there C was a plethora of local authorities to guide them on what the proper approach was. To reinforce what was decided in *Khoo Hi Chiang* and *Arulpragasan*, we wish to refer to a particular authority which was not considered in any of these decisions. It is *Saminathan & Ors v PP* [1955] MLJ 121 where that great judge Buhagiar J said this at pp 123–124:

D

> Before dealing with the other grounds of appeal, I consider it necessary, in view of the submission made in this case, to make some general observations on certain aspects of the law of evidence. Submissions are frequently made in criminal trials to the effect that there is a fundamental difference in the law of evidence in criminal and in civil cases and that in criminal cases the burden of proof on the prosecution is different from that on the defence. In E civil cases, it is said, a preponderance of probabilities is sufficient but in criminal cases the prisoner's guilt must be proved beyond reasonable doubt, with regard to the defence in criminal cases it is said that the burden of proof is not as high as that of the prosecution and that if the defence raises a reasonable doubt or if there is a preponderance of probabilities in favour of the accused, the accused is entitled to an acquittal.
>
> F Some confusion arises by the use of unreflective cliches and by recourse to English decisions and to statements therein without consideration to the relevant rules of evidence incorporated in the Evidence Ordinance 1950.
>
> There is no question that in English law and in this country there are important differences in the kind of evidence which is admissible in civil and G in criminal cases, because it is felt that some kinds of evidence which are admitted in civil cases would unfairly prejudice the accused in criminal cases (see per Lush J in *Hurst v Evans* [1917] 1 KB 352); but apart from such exceptions *there is no difference in the application of the rules of evidence to civil and criminal cases*, to prosecution and defence, and on the evidence admitted, the methods of demonstration and inference do not differ in civil H and criminal cases. In 9 *Halsbury's Laws* (2nd Ed) at para 265 it is stated:
>
> > 'The rules of evidence which govern the proof of facts in a criminal trial are substantially the same as those which apply in a civil trial, but there some particular points of difference arising from the special nature of criminal proceedings.'
>
> I And similarly, at para 278, with regard to the manner in which facts relevant to the issue must or may be proved.
>
> *It is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases.*

The position has been clearly set out by CK Allen in the article, 'The Presumption of Innocence' in 'Legal Duties' at p 287:

> 'Again, 'in a civil case a preponderance of probabilities is sufficient, but in a criminal case the prisoner's guilt must be proved beyond all reasonable doubt'. This statement is constantly repeated in the textbooks, but very little authority is cited for it, and it is difficult to know what real meaning is to be attached to it. Certainly it cannot mean that there is any substantive difference (except perhaps in certain offences where corroboration is required) between the methods of proof in civil and criminal cases, for it is laid down again and again that this is not the law. Is there any true difference between a preponderance of probabilities and a *reasonable* certainty (the converse of reasonable doubt)? 'Probability' may mean different things. It is often loosely used to indicate mere conjecture or plausibility. Neither in civil nor in criminal cases is a jury entitled to consider an averment established by conjecture or plausibility. But 'probability' may also mean the utmost degree of certainty or conviction which, upon the evidence of circumstances, things and statements, can be attained by our limited powers of reasoning and observation. *That degree of certainty or conviction exists, or ought to exist, in the decision of any legal issue.* It is difficult to see how men and women, called upon to weigh evidence either in civil or criminal matters, can bring to bear anything more than Pollock CB requires them — ie 'that degree of certainty that you would act upon in your own grave and important concerns'; for indeed they have no other means of reasoning. The principle of 'reasonable doubt' therefore seems to be little more than a *counsel of prudence*; and there is considerable judicial authority for this view. The warning is not so frequently uttered in civil cases, because the occasion is not so solemn; but does it follow that the same degree of care and certainty is not as necessary, or at least as desirable, in the one case as in the other? I apprehend that a judge who directed a jury in an action for damages, 'You need not be as careful in arriving at your conclusions as if you were trying a criminal case' would considerably startle the legal world and the public; and though there is a good reason for reminding juries of the necessity for caution in criminal cases, I know of no authority for the proposition that their duty is any less when property, and not life or liberty, is at stake.'

The background for the rule of prudence that requires more stringent proof in criminal than in civil cases is the presumption of innocence which came to maturity about 1865; with regard to this presumption Allen points out that:

> 'Historically and logically, we are led to a conclusion which has the sanction of that great master of evidence, Wigmore — namely, that the presumption of innocence amounts to little more than a caution to the jury not to arrive at hasty inferences and a reminder that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made.'

This caution has been expressed, in directions to the jury, in various forms: it was, I think, Martin J who first used the expression 'beyond reasonable doubt' in the case of *R v White* 4F & F 363 decided in 1896 where in charging the jury he said that:

> 'In order to enable them to return a verdict of guilty, they must be satisfied, beyond reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it is only an impression of probability, their duty is to acquit.'

There is no standard formula of explaining to the jury the rule that the prosecution must prove its case and notwithstanding the remarks by the House of Lords in *Woolmington*'s [1935] AC 462 and in *Mancini*'s cases (1942) AC 1, the Common Serjeant in *Kritz*'s case (*R v Kritz* [1950] 1 KB 82) directed the jury that they must be 'reasonably satisfied' of guilt and this direction was upheld on appeal [1950] 2 KB 82. In *Summer*'s case (*R v Summer* [1952] 1 All ER 1059), Lord Goddard disapproved the 'reasonable doubt' formulation.

The doctrine of reasonable doubt has been so constantly impressed upon juries that it has come to possess some of the characteristics of superstition. *No satisfactory definition has been given of this phrase and any explanation that has been given is very confusing when considered in relation to the definition of 'proved' in s 3 of the Evidence Ordinance 1950.* This Ordinance is in the main in accordance with English law though it does in several respects materially diverge from that law. English decisions serve as valuable guides and indeed are binding authorities where the English law has been followed in the Evidence Ordinance, but such decisions upon the meaning of particular words are of little or no assistance when those words have been specially defined in the Ordinance.

Section 3 of the Evidence Ordinance 1950 defined 'proved' as follows:

> 'A fact is said to be 'proved' when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

This applies to civil and to criminal cases and to prosecution and defence; the mental process of induction and deduction is the same in all cases. In view of this definition, the word 'reasonable' in the phrase 'reasonable doubt' would seem to denote a fluctuating and uncertain quantity of probability, and the question 'what sort of doubt is 'reasonable'?' in criminal cases is a question of prudence. In view of this definition the best explanation of 'reasonable doubt' is perhaps that given Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 where he said (at p 373):

> '[The degree of cogency] ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts, to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is

sufficient if he raises a doubt in the prosecution case and this he may do by 'disproving' a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however be 'proved' and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case.

I may finally add that the definition of 'proved' in s 3 of the Evidence Ordinance 1950 (which is identical to the Indian Evidence Act) reflects the trend of judicial opinion in England at the time when the rules of evidence were first codified in India, that is in 1855. In the case of *R v Burdett* 4 B & Ald 95 decided in 1820 Best J made the following observations:

> 'It has been said there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle.'
>
> (Emphasis added.)

It seems to have become necessary to state the obvious that the law does not permit double standards, and that there is only one test to determine whether a fact has been proved as required by law and that test is the one provided by s 3 of the Evidence Act 1950.

Much of what was said by Diplock LJ in *Haw Tua Tau* should have been diluted to nought by the fact that we have abolished jury trials in Malaysia by the Criminal Procedure Code (Amendment) Act 1995 which came into force on 17 February 1995. Nevertheless, so that we preserve the correct perspective, we must drive home the point that an English judge in a jury trial was never entrusted with the duty to attend to the sufficiency of the evidence for the prosecution at the close of its case. He has to ignore his own opinion of the weight or reliability of the prosecution evidence because these are matters *not* for him but solely for the jury. The judge can only allow the submission of no case if there is *no evidence* upon which — *if the evidence were accepted* — a properly directed reasonable jury could convict. This English rule is a safeguard for the accused because it permits the English judge to stop the case and direct a verdict of acquittal without calling for the defence, if the totality of the prosecution evidence

A is such that no reasonable jury properly directed would convict on the strength of that evidence alone. Edgar Joseph Jr SCJ (now FCJ) has dealt with this aspect so comprehensively in his judgments that we do not feel the necessity to say more. A neat summary of the English position can be found in *Archbold* [1993] Vol 1 paras 4–305 and 4–306.

B There is a fundamental change when the case is being tried by magistrates in the United Kingdom sitting without a jury because they are judges both *of facts* and law. So, at the close of the prosecution's case, if there is some evidence which, *if accepted*, would entitle a reasonable tribunal to convict, the magistrates have 'the same right as a jury *to acquit* if they do not accept that evidence whether because it is conflicting or has C been contradicted or for any other reason.'

Before *Khoo Hi Chiang* and *Arulpragasan* came on the scene, our (then) Supreme Court held that there was nothing in *Haw Tua Tau* which was inconsistent with this view. Thus, in *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217, Mohd Azmi SCJ (now FCJ) said at p 222:

D

> The principle to be applied at the close of the case for the prosecution in a jury trial as laid down by the Privy Council in *Haw Tua Tau v PP* [1981] 2 MLJ 49 had been considered by this country in *Munusamy v PP* [1987] 1 MLJ 492 at p 496. The unanimous opinion of the Supreme Court in *Munusamy* was that in so far as a trial before a single judge was concerned, *Haw Tua Tau* did not exclude or disapprove of the application of the long- E established prima facie case principle at the close of the prosecution case, as envisaged in ss 173(f) and 180 of the Code. There was no conflict in substance between the principle established in *Haw Tua Tau* and the principle consistently followed in this country since 1940 as laid down in *PP v Chin Yoke* [1940] MLJ 47.

F Rule 74 of the Rules has elevated the expression 'a prima facie case' from a legal cliche to a statutory provision. We must now go in depth into what this really involves. Standing by itself, the term 'prima facie' means 'at first sight'. But a 'prima facie' case means a case has proceeded to that stage where it is regarded as proved because the evidence led supports such a finding if evidence to the contrary is disregarded. See *Black's Law Dictionary* G (4th Ed) which goes on to say:

> A litigating party is said have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.

H This definition is no different from that contained in *Mozley and Whiteley's Law Dictionary* (11th Ed, 1993) which reads (at p 208):

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and I can be overthrown *only by rebutting evidence adduced by the other side.*

With the greatest respect to all concerned, we think that the implications of what constitutes 'a prima facie case' in a jury trial and a trial in which a judge is sitting alone are quite different. The omission to appreciate this

appears to have resulted in the importation of judicial *dicta* from jury trials in Commonwealth countries which has only served to cloud the real issues in Malaysia.

Where a judge is sitting with a jury, what he considers to be a prima facie case is of necessity circumscribed by his limited role on the issue as to whether there is evidence to go to the jury (see *R v Galbraith* (1981) 73 Cr App R 124 referred to by Edgar Joseph Jr SCJ in *Khoo Hi Chiang* [1994] 1 MLJ 265 at p 290). The relevant passage in this judgment is set out in full in his judgment in *Arulpragasan* at p 43). The equation of such a duty to a judge sitting alone as though a prima facie case meant the same thing in a summary trial is not correct in the Malaysian context.

Thus in *Karam Singh v PP* [1967] 2 MLJ 25 Ong Hock Thye FJ said (at p 30):

> Before concluding, we think we ought to respond to a request by Dato' Marshall that we express our views regarding a passage in the summing-up, as follows:
>
> > 'Gentlemen, if, at the end of the prosecution's case you are satisfied beyond reasonable doubt that the charge against the accused has been proved, then and only then do you consider the defence. But not otherwise. If at the end of the prosecution's case you are not satisfied beyond reasonable doubt that it was the accused who had committed the murder, then you acquit the accused at that stage and you do not consider the defence.'
>
> With the greatest respect, we think that those directions relate exclusively to summary trials in the subordinate courts, to which s 173(f) of the Criminal Procedure Code will apply: see *Soo Sing v PP* [1951] MLJ 143. In trials by jury before the court of a judge, however, s 214 makes different provisions by reason of the dichotomy in the functions of judge and jury.

Jury trials have been abolished in Malaysia from 17 February 1995. The dissenting judgments in *Arulpragasan* and the submissions made by the deputy public prosecutor in that case keep harping on the alleged distinction between a prima facie case in summary trials and proof of guilt beyond reasonable doubt at the end of summary trial by emphasizing the alleged absurdity which would arise if the decision to call for the defence is treated as a finding of guilt before the trial was over (see the judgment of Mohd Azmi FCJ in *Arulpragasan* at pp 16 and 23).

With respect, here is the second fallacy because when the defence is called in a summary trial the decision is NOT that the accused is guilty but that unrebutted (ie if nothing more was added to the defence submissions and no credible contrary evidence was called) the facts stated in the charge must be taken as *proved*. The word 'proved' has been defined in the Evidence Act 1950 and it can only carry the statutory meaning.

The degree of proof required by the framers of the Code is made ever more transparent by s 173(h) of the Code which reads:

> (h) If, when such evidence has been taken, the Court is of opinion that there are grounds for *presuming* that *the accused has committed the offence charged* or some other offence which such Court is competent to try and

A which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same.

The key word here is 'presuming', the meaning of which is provided by s 4 of the Evidence Act 1950. Presuming a fact means 'regarding the fact B as proved unless and until it is disproved'. The court will call for the defence on the original charge or on the amended charge only if it is of the opinion that there are grounds for regarding that all the factual ingredients which go to make up the charge have been proved unless and until disproved by the accused.

C *PP v Ong Khoon Seng* [1982] 1 MLJ 351 shows that it is a matter for the court's discretion whether the parties should be permitted to submit on whether there is a case to answer. The remaining subsections of s 173 of the Code show that even if the accused elects to remain silent and calls no witness himself, he can recall the prosecution witnesses for cross-examination. Section 174(2) shows that the accused has another opportunity D of address at the close of the defence's case. In the subordinate courts, the prosecutor has a right of reply on the whole case when the accused has adduced evidence. In the High Court also, after the abolition of jury trials — and after the accused has been called to enter upon his defence — the accused can, even if he elects to remain silent, call other witnesses if he chooses and make a final submission. This much is clear from s 182 of the E Code which gives the prosecuting officer a final right of reply on the whole case 'whether the accused adduces evidence or not'. All this means that the court only considers the guilt and consequent liability of the accused to a conviction when this final stage has been reached.

To put it another way, what the court is concerned with at the close F of the prosecution's case is the *probative force* of the prosecution's evidence. Taken in its totality, its force must be sufficient (if no further evidence is adduced to the contrary) to induce the court *to believe* in the existence of the facts stated in the charge or *to consider* its existence *so probable* that a prudent man ought to act upon the supposition that those facts existed or G did happen. This exercise cannot be postponed to the end of the trial. The law requires the court to carry it out then and there whether or not the submission is made and before the court announces its decision to call for the defence.

In summary trials, therefore, establishing a prima facie case is simply just another way of saying that the prosecution evidence at its close must H be such as would, *if unrebutted*, warrant the conviction of the accused. However, for the benefit of those who see more in *Haw Tua Tau* than they should, this does not mean that a conviction should automatically follow if the defence is called. That will happen if the defence calls no evidence at all to rebut the prosecution case, and does nothing before the end of the I trial to dissuade the court from the view it has taken. In other words, calling for the defence is not of itself a pronouncement of guilt or a conviction but a ground for proceeding with the next stage of the case when it becomes the accused's obligation to tip the scales of justice back in his favour.

The degree of proof required to establish a prima facie case is easiest demonstrated by asking ourselves what the court should do after the defence is called, if the accused elects to remain silent, calls no evidence, and cannot come up with any good reason why the earlier conclusion was wrong, eg, by bringing new authorities which take a different view of the law or pointing out some inherent weaknesses in the prosecution case he may have overlooked earlier. Thus unqualified, and unrebutted the court has to convict on the very same material. Nobody would dare suggest as a matter of prudence that the degree of proof required at this stage is not proof beyond all *reasonable* doubt. Nobody has yet satisfactorily explained why it should be any different at the close of the case for the prosecution in a summary trial. Each state calls for the decision by the judge or magistrate of a legal issue which only predicates that degree of certainty required by s 3 of the Evidence Act.

Consequently, it is the opinion of this court that merely because some parts of the prosecution evidence support the charge, the defence should *not* be called regardless of the state of the rest of the evidence. The court must make an assessment of the prosecution evidence as a whole and must acquit if it cannot accept the prosecution's case because it cannot be believed (or is not credible — it means the same thing) by reason of material contradictions or for any other reasons.

So far as the Court Martial Rules of Procedure is concerned, it is to be noted that after the defence is called and the three alternatives explained (r 75), the accused then makes the case for the defence (r 76) after which he closes the defence's case. By r 78, after all the evidence is given, the defence makes its final closing address *after* the prosecution. By r 80, the court martial closes to deliberate on its findings on the charge only *after* the closing addresses and the summing up by the judge advocate. We mention this to underline the fact that the decision to call for the defence is not of itself a decision to convict but only a step in the decision-making process.

We do not know which test the court martial applied in deciding to call for the defence but out of deference to En Karpal Singh's submission, we will assume that they applied the *Haw Tua Tau* test. The record shows that the court martial found the prosecution had *proved* a prima facie case on all the factual ingredients of both charges because they were tacked on to, and formed an integral part of, the decision to call upon the defence. At the time, the *Haw Tua Tau* decision was good law and binding on all inferior courts in the country.

As we indicated earlier, the appeal period under r 101(2) has long since expired. If a court did err in applying the wrong yardstick on the burden of proof, or wrongly admitted inadmissible evidence or committed some other procedural error, it is always open to the appellate court to rectify the matter. Appeals are by way of rehearing and the appellate court can therefore determine what the result ought to have been if the proper tests had been applied. It will not interfere unless there has been a miscarriage of justice.

A What is important to remember is that such evidentiary or procedural errors made in good faith do not of themselves render the decision a nullity. Once a final judgment has been pronounced, the parties are estopped and cannot canvass the same question in another action although had some other argument or objection been raised at the first trial it may have led to a different judgment. The matter in dispute having passed *in rem judicatam*, the former judgment while it stands is conclusive between the parties. There are two reasons for this. The first is public policy which requires an end to litigation, and the second is that a party shall not be vexed twice for the same cause.

There is another aspect to this matter. Provided no injustice be done C nobody has a vested interest in the course of procedure if during his litigation the procedure is changed, and so also with respect to alterations in the law of evidence. These cases are listed in *Broome's Legal Maxims* (10th Ed) at p 355 and see *PP v Datuk Hj Harun bin Hj Idris* [1977] 1 MLJ 14.

D The matter does not end there however. We have not lost sight of the fact that by electing to come to court for certiorari rather than appeal as provided for by the Rules, the accused was now opening two — if not three — further opportunities to ventilate his grievances if this matter gets to the Federal Court. Rule 101(2) only allows one chance for review or reconsideration. Echoing *Mejar Ali Zaman bin Ali Hassan v Captain Abdul* E *Kadir & Anor* [1989] 3 MLJ 32 we think that the civil courts should be very careful to ensure that in the guise of an application for certiorari the courts are not converted into appellate courts. It is only in *exceptional* circumstances that we should interfere; eg, a failure of natural justice because the accused was convicted for an offence with which he was never F charged, and that offence was an offence which was distinct and materially different from the charge on which he was tried.

We entirely agree with the view of the learned High Court judge that had the court martial applied the *Khoo Hi Chiang* test it would have still called for the defence. We do not propose to repeat the whole of the G prosecution evidence here. The sting of the alternative charge was that the accused had incorporated Sukma Enterprise ('Sukma') with the sole object of using it as a vehicle for diverting to himself money to be earned from contracts he would arrange to be awarded to it by virtue of his position as the commanding officer of 72 KOD. He also arranged for a bank account to be opened in the name of Sukma into which the contract money could H be paid. This evidence was given by his daughter, who also said she held 60% of the shares therein for the accused who was her father. The person initially involved in selecting the tenders for the accused's approval was the accused's son-in-law and he also gave evidence. Other witnesses were called who were directly involved in processing those contracts which were awarded to Sukma. The witnesses who gave evidence of the matters I relating to the second charge were also speaking from personal knowledge.

As to En Karpal Singh's second complaint, we must say here that there is no legal requirement for a court to give reasons for its decision to

call for the defence: see *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217. Such a decision is a procedural ruling during a trial and is not by itself appealable (see *PP v RK Menon & Anor* [1978] 2 MLJ 152). The need to give reasons only arises if there is an appeal against an acquittal at the close of the prosecution's case, or in the event of an appeal against a conviction at the end of the trial because the court will be obliged to explain why the accused has failed to rebut the prosecution's case.

In conclusion, we wish to reiterate that with the abolition of jury trials and preliminary inquiries, all criminal trials in Malaysia are summary now. An accused person should not be called upon his defence to 'disprove' the facts spelt out in the charge against him unless the prosecution has first 'proved' their case as that word is defined by the Evidence Act 1950. In our view — and with greatest respect to all concerned — anything less would involve not only a non-compliance with the clear mandate of the Evidence Act 1950 but also the abdication of a duty which is fundamental to the dispensation of justice.

So far as the present case was concerned, the complaint of the accused was properly the subject matter of an appeal under r 101(l). The court martial, as the record indicates, was meticulous in following the Rules. There was nothing wrong whatsoever with the decision-making process. It was the decision with which the accused was aggrieved. We agree with the learned judge in the court below that the failure to resort to r 101(2) was sufficient ground for the refusal to exercise any discretion for prerogative relief in the accused's favour.

Appeal dismissed.

Reported by K Tang-Wai